No. 86188-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARY FRANKLIN,

Respondent,

v.

JACKIE JOHNSTON,

Petitioner.

RESPONDENT MARY FRANKLIN'S SUPPLEMENTAL BRIEF

DAVIS WRIGHT TREMAINE LLP
Roger A. Leishman, WSBA No. 19971

1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

Attorneys for Respondent
Mary Franklin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. INTRODUCTION

From the day he was born over six years ago, A.F.J. has been blessed with two mothers who love him. Respondent Mary Franklin is an experienced nurse who has successfully juggled her career while serving as her son's primary caregiver, including during the many years when her former partner Petitioner Jackie Johnston struggled with addiction. Even before A.F.J. was born, the couple planned to raise him together with Franklin as the breadwinner. Franklin picked his first name, and as the boy's initials suggest, his other names represent each of his mothers' surnames. Even after the two women became estranged, Johnston continued to acknowledge that Franklin was their son's co-parent. As Judge Kimberly Prochnau observed at the conclusion of a multi-day bench trial, Franklin has wholly and completely undertaken a permanent, unequivocal, committed, and responsible parental role in A.F.J.'s life—and if "she does not qualify as a *de facto* parent" under the criteria established by this Court, "then no one would." CP 750. This Court should affirm the lower courts' determination that A.F.J. has two parents.

First, Johnston should be ***judicially estopped*** from contradicting her prior testimony that Franklin is A.F.J.'s "other mother," and that Johnston consented to and fostered the parent-child relationship between Franklin and A.F.J. As Johnston represented to the trial court in successfully opposing

termination of her own parental rights, A.F.J. has "two mothers and is bonded to both." CP 1098.

Second, substantial evidence supports each of Judge Prochnau's factual findings that Franklin is a *de facto* parent. The trial court properly exercised its discretion in applying the *de facto* parent doctrine and concluding that A.F.J. has always had two loving parents: Franklin and Johnston.

Third, this is a dispute between estranged former partners, not a test case regarding the status of licensed foster parents. Contrary to Johnston's suggestion in the Petition for Review, the Court need not reach the question of when and how the *de facto* parentage doctrine might apply to traditional foster parents with no prior parental relationship with the child, because it is undisputed that Franklin was ***already*** parenting A.F.J. when the State required her to become foster licensed after he had become dependent as a result of his biological mother's neglect. Indeed, this case involves unique facts that are unlikely to be repeated—in 2007 the Legislature amended RCW 13.34.130, which formerly required individuals who had an existing bond with a dependent child but who did not meet the statutory definition of "relative" to become foster licensed as a prerequisite for any placement. Moreover, despite DSHS's initial recommendation for a traditional foster placement, the trial court instead placed A.F.J. with Franklin ***at Johnston's***

request. Johnston consented to and fostered the parent-child relationship between Franklin and A.F.J. throughout their years together and even after the couple finally separated. As Johnston repeatedly testified, Franklin is A.F.J.'s other mother. This Court should affirm.

II. STATEMENT OF THE CASE

A. Summary of Factual Background[1]

Franklin and Johnston began dating in 2002, and were in a committed intimate relationship at the time their son A.F.J. was born on November 20, 2005. CP 382, 1088. Even though Johnston's addictions put continuing pressure on the relationship, it continued with ups and downs for about five years, and was Johnston's "longest relationship." Ex. 14 at 5.

In 2005, Johnston became pregnant as a result of a drug-fueled encounter with a stranger. CP 355. Although neither woman had intended to have a child, both welcomed their role as parents. Franklin supported Johnston during her pregnancy and after, and the couple lived together when Johnston was not in treatment. CP 16. A month before A.F.J.'s birth, Johnston reported that she "definitely wants the child, and Mary is supportive," and that Franklin would be "the breadwinner." Ex. 49 at p. 2.

[1] The parties' history is detailed in the opinion of the Court of Appeals, *In re Parentage and Custody of A.F.J.*, 161 Wn.App. 803, 251 P.3d 276 (2011), and in the trial court's findings of fact, CP 748-50.

Nevertheless, for over four years, Johnston's addictions prevented her from parenting A.F.J. CP 17, 1089. Throughout that time Franklin raised their son alone. CP 17, 95-100. Johnston repeatedly confirmed her intention that Franklin raise A.F.J. as his other parent. *See, e.g.,* CP 1088-89. For example, on November 6, 2006, Johnston wrote to Franklin, "I do love crack more than [A.F.J.]. He doesn't deserve a mom like me. He does deserve you.... Raise him well. I'm sorry for everything but you got a son out of your terrible ordeal with me." Ex. 5; CP 286. On December 14, 2006, Johnston again wrote to Franklin "he is yours as much as mine and always will be." Ex. 6.

Franklin and Johnston are no longer committed intimate partners. CP 382. Yet even after the couple's romantic relationship ended, Johnston continued to take the position that Franklin was A.F.J's "co-parent." CP 1089. In November 2007, Johnston again "reported that she was in a relationship with Mary Franklin when her son was born and that Mary 'has always been the other parent.'" Ex. 14 at 6. More recently, however, the former couple—like countless other separated parents—have been involved in disputes over custody and finances, and Johnston's current pleadings flatly contradict her prior representations.

B. Franklin's Relationship With DSHS

On January 22, 2006, Franklin reported to Child Protective Services

that she had found Johnston unconscious and alone with their son. CP 1117. This resulted in A.F.J.'s emergency removal from their home because Franklin could show no legal connection to the child.

At the 72-hour Shelter Care Hearing, the Department of Social and Health Services recommended that A.F.J. be placed in licensed foster care, rather than with Johnston or Franklin. RP (1/31/08) at 7:19-23. Johnston's attorney requested that the court instead leave A.F.J. with Franklin as a "responsible adult placement." Ex. 20 at 1. (Placement with a "Responsible Adult," which DSHS also calls a "suitable other," is an alternative to placing a child either with a parent or guardian, with a "relative" as defined by statute, or in traditional "licensed care." *See* CP 915-16.) After an extensive hearing, Commissioner Graham concluded that "Ms. Franklin essentially has been a second parent to this child." RP (1/31/08) at 34:9-10. The court placed A.F.J. with Franklin, and directed that she "take steps to become a licensed foster care parent" and "cooperate fully" with DSHS. Ex. 201 at 2.

On March 7, 2006, both Johnston and Franklin signed a "Comprehensive Family Assessment" identifying Johnston as the "Birth Mom" and Franklin as the "Co-Parent." Ex. 188. On April 5, 2006, Johnston agreed to an Order of Dependency that authorized DSHS to maintain A.F.J. in a "Responsible Adult Placement" with Franklin rather than place A.F.J. with a relative or a licensed care-giver. CP 915-16.

In Fall 2006, Franklin completed a home study and obtained her foster license as ordered by the court. Ex. 201; CP 257. In Washington, licensed foster parents are not paid a salary and instead receive a monthly allotment on behalf of the child to meet his or her basic needs, such as food, clothing, and personal incidentals.[2] After she became foster licensed, Franklin received such payments on behalf of A.F.J. for a time before they were discontinued in May 2008. Ex. 81. Franklin did not assume A.F.J.'s care with any expectation of compensation. CP 358.

C. Summary of Procedural History

DSHS initiated dependency proceedings against Johnston on January 26, 2006. CP 893. On April 5, 2006, the trial court entered an Agreed Order of Dependency and Disposition as to Johnston. CP 909. Johnston acknowledged the facts under which the court found under RCW 13.34.030(5)(b) that she had abused or neglected A.F.J. CP 915. On May 10, 2006, the court entered an order of dependency by default against A.F.J.'s unknown birth father. CP 921.

On May 8, 2007, the State filed a petition for termination of parent-child relationship. CP 1059. On July 26, 2007, the court entered an order terminating the parental rights of the unknown father. CP 1070.

---

[2] *See Guardianship Estate of Keffeler v. State DSHS*, 145 Wn.2d 1, 32 P.3d 267 (2001). The Level I basic rate, based on the age of the child, ranges from $423.68 to $575.30 per month. *See* http://www.dshs.wa.gov/pdf/ea/FosterCarePayments.pdf

On November 7, 2007, Franklin petitioned for a finding of *de facto* parentage (and alternatively third-party custody) of A.F.J. CP 4. The *de facto* parentage case was linked with and ultimately consolidated with Johnston's then-pending dependency and termination case. CP 3.

From April 8 to April 23, 2008, Judge Teresa Doyle conducted a trial regarding termination of Johnston's parental rights. On May 9, 2008, the court continued the termination proceedings pending the resolution of Franklin's parentage action. CP 1162.

From March 24 to April 21, 2009, Judge Kimberly Prochnau conducted a trial on Franklin's *de facto* parentage and alternative third-party custody claims. On May 22, 2009, the trial court determined that Franklin is A.F.J's *de facto* parent. CP 704; RP (4/13/09) at 20:15-17. The court also ordered Franklin to pay child support and attorney's fees under the third-party custody statute, and entered a parenting plan with interim provisions. CP 701. The trial court dismissed the dependency and termination case against Johnston based on the permanency plan of placing A.F.J. with both mothers. CP 1176.

Appearing *pro se,* Franklin appealed from the attorney's fees and support rulings. Johnston cross-appealed from the *de facto* parentage ruling. Division I of the Court of Appeals issued a reported decision on May 16, 2011, affirming the trial court judgment. *In re Parentage and Custody of*

A.F.J., 161 Wn.App. 803, 251 P.3d 276 (2011). Johnston petitioned for review, and Franklin cross-petitioned. On September 26, 2011, this Court granted review solely of the *de facto* parentage determination.

III. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Franklin restates the legal issue presented for review as follows:

> Whether the intimate partner of a child's biological mother who cared for the child from birth may seek a determination of *de facto* parentage, where the State required her to become foster licensed under former RCW 13.34.130 after the child was found dependent as a result of the biological mother's neglect?

IV. ARGUMENT

A. Johnston Is Estopped From Denying That She Intended Franklin To Be A.F.J.'s Other Mother.

As a threshold matter, the Court should apply judicial estoppel principles to bar Johnston from taking factual positions on appeal that are directly contrary to her testimony and other representations to the trial courts.[3] In her successful effort to avoid losing her parental rights during the dependency and termination proceedings, Johnston repeatedly testified that A.F.J. has "two mommies," Johnston and Franklin, and is "bonded to both." Now that Johnston's turbulent relationship with Franklin is over and the trial judge found her to be a fit parent, Johnston has changed her mind. Johnston

[3] Although Franklin – while proceeding *pro se* – did not raise judicial estoppel before the Court of Appeals, this Court may apply the doctrine to affirm the ruling on appeal. *See, e.g., State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) ("This court may affirm a lower court's ruling on any grounds adequately supported in the record.").

now claims on appeal that Franklin never formed a parent-like relationship with A.F.J., and that she never consented to or promoted any such relationship. This Court should estop Johnston from contradicting the facts which she testified to at trial.

Judicial estoppel—also called the rule against inconsistent positions—is an equitable doctrine that "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (citation omitted). Three core factors guide the court's decision to apply judicial estoppel: (1) whether the later position is clearly inconsistent with the earlier position; (2) whether judicial acceptance of the later position would create the perception that either the first or the second court was misled; and (3) whether the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 538–539. These factors are not an "exhaustive formula," but rather help guide a court's discretion to apply the doctrine. *Id.* at 539 (citation omitted).

The doctrine seeks to "preserve respect for judicial proceedings without the necessity of resort to the perjury statutes" and to "bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings." *Seattle-First Nat'l Bank v.*

Marshall, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982). Accordingly, the doctrine may apply "even if the two actions involve different parties [and even if there is] no reliance, no resultant damage, and no final judgment entered in the first action." *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 908, 28 P.3d 832 (2001). "The heart of the doctrine is the prevention of inconsistent positions as to facts." *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974).

Here, Johnston's appeal takes numerous factual positions "clearly inconsistent" with her prior sworn testimony and representations to the trial judges. From the moment A.F.J. was first removed from her custody, Johnston repeatedly maintained, argued, and testified that Franklin is A.F.J.'s "parent," that Franklin and A.F.J. are "bonded" in a parental relationship, and that A.F.J. considers Franklin to be his "mommy." For example, at the initial 72-hour shelter hearing, Johnston specifically asked the court to place A.F.J. with Franklin, arguing that "Ms. Franklin essentially has been a ***second parent*** to [A.F.J.]" and it was in A.F.J.'s "best interests to remain with Ms. Franklin." RP (1/31/06) at 33:2–3, 34:9–10 (emphasis added).

At the termination proceeding, Johnston sought to maintain her parental rights by relying heavily on Franklin as A.F.J.'s "co-parent," arguing that "Alec knows ***two mothers*** and is ***bonded to both***." CP 1088–89, 1098 (Johnston Opp. Br. 4/4/08) (emphasis added). Johnston made clear that

despite her turbulent relationship with Franklin, she "***wants*** to co-parent Alec with Ms. Franklin." CP 1089 (emphasis added). In fact, during the termination trial Johnston unequivocally testified that:

- Franklin had been A.F.J.'s "co-parent" his entire life. RP (4/8/08) at 96:2–5.
- "Alec loves Mary [Franklin]." RP (4/16/08) at 7:4.
- Franklin is "definitely a parent to Alec." RP (4/23/08) at 46:22.
- A.F.J thinks of Franklin as "[o]ne of his mothers." RP (4/23/08) at 46:23–24.

Johnston personally benefited from her successful representations regarding Franklin's role as A.F.J.'s other mother. First, as Johnston requested, A.F.J. remained in the family home rather than being placed with strangers. Ex. 201; RP (1/31/06) at 32:17-19. Second, in her termination trial two years later, Johnston avoided termination and convinced the court to instead "decide the custody arrangements for [A.F.J.] and his two mothers" in the parentage action brought by Franklin. CP 1101. As Judge Prochnau observed, Johnston "nearly lost all rights to her child in the termination trial," and "***but for*** the issue of whether third-party custody [by Franklin] was a viable option, it appears that Judge Doyle would have terminated her parental rights." RP (4/24/08) at 6:19-23 (emphasis added).

At the subsequent *de facto* parentage trial, Johnston again testified that A.F.J. calls Franklin "Mommy Mary" and refers to Franklin's house as

his "home." RP (3/30/09) at 46:10–16. Johnston also testified that A.F.J. has "two mommies and ***I want him to have two mommies***." RP (4/9/09) at 15:19–20 (emphasis added).

Now, on appeal—***after*** her tumultuous relationship with Franklin has finally come to an end—Johnston argues the opposite. Her Petition to this Court claims that Franklin is not A.F.J.'s "parent," that Johnston merely "passively acquiesce[d] to [A.F.J.'s] placement with Franklin," and that Johnston did not "consent to and foster" a parental relationship between A.F.J. and Franklin. Pet. Rev. at 12–13, 15–18.

Well-established principles of judicial estoppel bar Johnston from taking these factual positions on appeal, which directly contradict her repeated prior sworn testimony. In *Miles v. Child Protective Services*, 102 Wn. App. 142, 6 P.3d 112 (2000), for example, the court applied judicial estoppel under similar circumstances. There, during a dependency proceeding, the parents agreed to an order finding that their children were abused or neglected. *Id.* at 150–51. Then, in a subsequent lawsuit against the state, the parents argued that they never abused or neglected their children. *Id.* at 152. The court ruled that collateral and judicial estoppel barred the parents from disputing the fact of their abuse or neglect. The court explained: "Judicial estoppel precludes the Miles from agreeing in open court in the dependency case that their children *were* abused or neglected,

then arguing in open court in this case that their children *were not* abused or neglected." *Id.* at 153 n.21 (emphasis in original).

The same rule applies here. Judicial estoppel precludes Johnston from arguing on appeal (now that her relationship with Franklin has ended) that Franklin has no parent-like relationship with A.F.J. after repeatedly testifying that Franklin has been A.F.J.'s "parent" his entire life. Specifically, Johnston cannot claim on appeal that A.F.J. never formed a "parent-like" bond with Franklin after telling the court in the termination proceeding that "Alec knows ***two mothers*** and is ***bonded to both***." CP 1088–89, 1098 (Johnston Opp. Br. 4/4/08) (emphasis added), Likewise, Johnston cannot tell this Court that she never "consented to and fostered" Franklin's parent-like relationship with A.F.J, *see* Pet. Rev. at 12–13, 15–18, after representing in the termination proceeding that she "***wants*** to co-parent Alec with Ms. Franklin," CP 1089 (emphasis added), and testifying at the parentage trial that A.F.J. has "two mommies and ***I want him to have two mommies***," RP (4/9/09) at 15:19–20 (emphasis added). Johnston now attempts precisely what judicial estoppel seeks to prevent—factual positions "contrary to sworn testimony [Johnston] has given in prior judicial proceedings." *Seattle-First Nat'l Bank*, 31 Wn. App. at 343. The Court may affirm the judgment on this independent basis.

B. Substantial Evidence Supports The Lower Court's Finding That Franklin Met Each Of The *L.B.* Factors For *De Facto* Parentage.

This Court has recognized that the existence of a parent-child relationship is determined by the realities of family life and individual connections, rather than focusing solely on isolated factors such as biology or marital status. *In re the Parentage of L.B.*, 155 Wn.2d 679, 693, 122 P.3d 161 (2005).[1] As the Court observed in *L.B.*,

> Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely.... Reason and common sense support recognizing the existence of *de facto* parents and according them the rights and responsibilities which attach to parents in this state.

Id. at 687, 689, 707. The five criteria for determining *de facto* parentage are:

> (1) the biological or adoptive parent "consented to and fostered the parent-like relationship"; (2) the "petitioner and the child lived together in the same household"; (3) the petitioner "assumed obligations of parenthood without expectation of financial compensation"; (4) the petitioner "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature"; and (5) the petitioner has "fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."

Id. at 708. The trial court found that Franklin presented substantial evidence

---

[4] Even before the recent visibility of lesbian and gay families, advances in assisted reproductive technology, and other contemporary changes to family patterns, Washington courts did not limit their understanding of the parent-child relationship to biological or adoptive parentage. *See, e.g., L.B.*, 155 Wn.2d at 691-92.

supporting each finding. CP 748.

Johnston asks this Court to reverse all but the second of these findings. ***First***, Johnston argues that she did not consent to and foster Franklin's parental relationship with A.F.J. Pet. Rev. at 12-13. However, as discussed above, extensive testimony and other evidence corroborates the trial court's finding that Johnson actively fostered Franklin's role as A.F.J.'s other mother. Contrary to Johnston's suggestion, she was not limited to "mere passive acquiescence." *Id.* at 13 (citing *In re Dependency of D.M. & S.R.*, 136 Wn. App. 387, 397, 149 P.3d 433 (2006) and *In re Adoption of R.L.M.*, 138 Wn. 276, 289, 156 P.3d 940 (2007)). In both *R.L.M.* and *D.M.*, after the children were removed from their homes of origin, DSHS placed them with relatives without the knowledge or consent of the biological mother. In contrast, Johnston originally made a home together with A.F.J. and Franklin, and when CPS intervened it was Johnston who asked the court to place their son with Franklin while she struggled with her own problems. Ex. 201 at 1. Johnston continued to acknowledge Franklin's parental role both before and after Franklin obtained a foster license as required by the State. Ex. 49 at 2; CP 1089. This was not mere passive acquiescence.

Second, Johnston challenges the trial court's finding that Franklin "assumed obligations of parenting with expectation of financial compensation." Pet. Rev. 13. To the contrary, both women expected that

Franklin would be the "breadwinner," Ex. 49 at 2, and Franklin freely took A.F.J. into her home from birth. CP 16. The fact that Franklin subsequently received foster payments on his behalf for a limited period does not contradict the trial court's finding that Franklin assumed a parental role without expecting money in return.

Third, although Johnston concedes that *L.B.* does not impose a "rigid time requirement," she challenges the trial court's factual finding that Franklin had been "in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature." Pet. Rev. 17. Johnston erroneously insists that the court could not consider any part of the period when A.F.J. was placed with Franklin ***at Johnston's request*** and over DSHS's objection. *Id.* at 18. In any event, regardless of whether one considers the two months from his birth until CPS intervened as a result of Johnston's neglect, the five months before the agreed order of dependency, the nine months before Franklin became foster licensed, or the four and half years before the parentage trial, the lower courts correctly found that Franklin was A.F.J.'s primary parent for virtually his entire life.

Fourth, Johnston challenges the trial court's finding that Franklin had "fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." Pet. Rev. 15. Johnston points to no evidence remotely suggesting that Franklin was anything but the most

stable and responsible parental figure in A.F.J.'s life. To the contrary, overwhelming evidence, including testimony by both mothers, confirms that Franklin embraced her parental role even before Johnston's drug problems resulted in dependency, and Franklin's devotion to A.F.J. has never wavered since. *See, e.g.,* CP 16, 573-74, 750

Finally, Johnston contends that the lower courts' rulings "carelessly trampled over all biological parents' constitutional liberty interests." Pet. Rev. at 1. But this Court specifically found that the first of the *de facto* parent factors (the biological or legal parent's consent to and fostering of the parent-like relationship) "incorporates the constitutionally requisite deference to the legal parent." *L.B.*, 155 Wn.2d at 709. Under *L.B.,*

> The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that ***can be achieved only through the active encouragement of the biological or adoptive parent*** by affirmatively establishing a family unit with the de facto parent and child or children that accompany the family. [footnote omitted.] In sum, we find that ***the rights and responsibilities which we recognize as attaching to de facto parents do not infringe on the fundamental liberty interests of the other legal parent*** in the family unit.

155 Wn.2d at 712 (emphasis added). *See also In re Custody of B.M.H.,* ___ P.3d ___, 2011 WL 6039260 (Wn. App. Dec. 6, 2011) (in absence of second parent, biological mother's former spouse could seek determination of *de facto* parentage).

Johnston acknowledges that a "*de facto* parent stands in legal parity with other legal parents." Pet. Rev. 19. As Johnston testified repeatedly, A.F.J. has always had two mothers—herself and Franklin. This Court should affirm the lower court's parentage determination.

C. This Case Does Not Involve Relationships Created By Traditional Foster Placement.

The *de facto* parentage doctrine is a stringent but flexible rule that lower courts apply on a case-by-case basis. Nevertheless, Johnston asks this Court to impose a bright line rule and terminate A.F.J.'s parental bond with Franklin solely because she obtained a foster license as ordered by the court and continued to care for A.F.J. for several years while Johnston struggled with drugs and the law.

Johnston recites a parade of horribles that might result from allowing a mere "foster placement to form a basis for recognizing the foster parent as a *de facto* parent." Pet. Rev. 18. But Franklin was not a traditional foster parent, and the lower courts did not rely on any foster placement as the basis for their parentage determination. As this Court observed in *L.B.,* traditional foster placements by their nature generally are "temporary." 155 Wn.2d at 691 n.7 (quoting *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991)). In contrast, Franklin had already undertaken a ***permanent*** parental role with Johnston's active consent. CP 16. She obtained a foster

license only because the court ordered her to do so, presumably to comply with former RCW 13.34.130, which required individuals who had an existing bond with a dependent child but who did not meet the statutory definition of "relative" to become foster licensed as a condition of any placement. But in 2007 the Legislature amended RCW 13.34.130 to remove this license requirement. *A.F.J.*, 161 Wn.App. at 820 n.8. The Court may therefore resolve this case on its unique facts. [4]

Finally, Johnston makes the misleading representation that she "recommended placing A.F.J. with Franklin, her ***former*** intimate partner, because Franklin and the child were familiar with each other," and argues that "[s]uch decisions that promote stable placement of children and the ultimate reunification of families are much less likely to occur if the natural parent knows they might lead to ***foster parents*** being found *de facto* parents." Pet. Rev. 19 (2nd emphasis in original). In fact, at the time Johnston asked the court to place A.F.J. with Franklin, they were ***current*** partners who had been caring for the boy together, CP 565, and Johnston obviously knew that

[5] As amicus curiae Legal Voice observed below, it is conceivable that some foster parent under particular extraordinary circumstances might satisfy the stringent *L.B.* standards. The Court is aware of some of the daunting challenges facing Washington's overburdened foster system, and the wide variety of individual circumstances that bring families into contact with DSHS every year. Franklin respectfully submits that the *L.B.* standards provide lower courts with a flexible equitable tool to address individual disputes on a case-by-case basis, and that the categorical exclusion of traditional foster parents would be unwarranted. In any event, it is unnecessary to reach such broader issues in the present case.

Frankin was ***not*** a foster parent. RP (1/31/08) at 23:4-5. The court granted Johnston's request, specifically finding that "Ms. Franklin essentially has been a second parent to this child." RP (1/31/08) at 24:9-10.

As with the petitioner in *L.B.,* Franklin had "no statutory remedy whereby she can attempt to have her relationship *with a child whom she has raised since birth* legally recognized," and therefore must rely on the *de facto* parentage doctrine. *A.F.J.,* 161 Wn.App. at 817 (emphasis in original). The State's response to Johnston's neglect of A.F.J. did not nullify the boy's parent-child relationship with his other mother. Substantial evidence supports each of Judge Prochnau's factual findings that Franklin is a *de facto* parent, and the trial court properly exercised its discretion in applying the *de facto* parent doctrine to Franklin.

V. CONCLUSION

Mary Franklin has been A.F.J.'s second parent since the day he was born—regardless of the ups, downs, and eventual end of her romantic relationship with Johnston. Notwithstanding Johnston's revisionist spin, she intended Franklin to be A.F.J.'s other mother. This Court should affirm the judgment below.

RESPECTFULLY SUBMITTED this 21st day of December, 2011.

DAVIS WRIGHT TREMAINE LLP

By _____

Roger A. Leishman, WSBA No. 19971

CERTIFICATE OF SERVICE

I, Linda Nordstedt, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct. I am over the age of 18 years and not a party to the within cause. I am employed by the law firm of Davis Wright Tremaine LLP and my business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

On December 21, 2011, I caused to be served the attached **RESPONDENT MARY FRANKLIN'S SUPPLEMENTAL BRIEF** to the following individuals:

Via First Class U.S. Mail:
Original and one copy
Washington State Supreme Court
415—12th Avenue SW, PO Box 40929
Olympia, WA 98504

Via First Class U.S. Mail:

Dennis J. McGlothin
Robert J. Cadranell, II
Olympic Law Group, P.L.L.P.
1221 E. Pike Street, Suite 205
Seattle, WA 98122

Ruth Laura Edlund
Wechsler Becker LLP
701 5th Avenue, Suite 4550
Seattle, WA 98104

Lori Larcom Irwin
King County Superior Ct/Dependency CASA
1410 E. Jefferson Street, Suite 500
Seattle, WA 98122

Trisha L. McArdle
Office of the Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98104

Carrie Hoon Wayno
Office of the Attorney General
7141 Cleanwater Drive SW
P.O. Box 40124
Olympia, WA 98504

Sheila Malloy Huber
Office of the Attorney General
7141 Cleanwater Drive SW
P.O. Box 40124
Olympia, WA 98504

David J. Ward
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101

J. Mark Weiss
AAML President, Washington Chapter
200 W. Mercer Street, Suite 410
Seattle, WA 98119

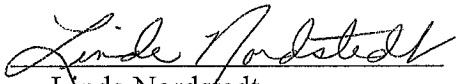
Michael Finesilver
American Academy of Matrimonial Lawyers
207 East Edgar St.
Seattle, WA 98102

Peter S. Lineberger
900 N. Maple St., Suite 102
Spokane, WA 99201

Carol J. Ellerby
Public Defenders Association
810 3rd Avenue, Suite 800
Seattle, WA 98104

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 21st day of December 2011, at Seattle, Washington.



Linda Nordstedt